

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

76-7167

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MILDRED POPKIN,

Plaintiff-Appellant,

-against-

NEW YORK STATE HEALTH AND MENTAL HYGIENE
FACILITIES IMPROVEMENT CORPORATION,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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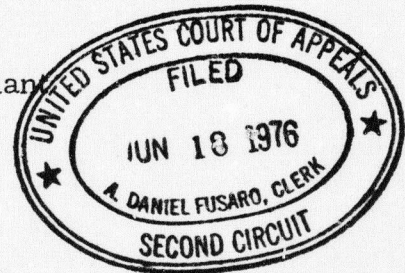


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MILDRED POPKIN :

Plaintiff-Appellant. :

-against- :

Docket #

76-7167

NEW YORK STATE HEALTH AND MENTAL HYGIENE :
FACILITIES IMPROVEMENT CORPORATION :

Defendant-Appellee. :
----- x

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

The decision below was rendered by Hon. Lloyd F.
Mac Mahon, United States District Judge. His decision is
not reported.

THE ISSUES PRESENTED FOR REVIEW

Was defendant a "political subdivision" at the
time of plaintiff's termination and thus exempt from the
provisions of Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000(e) et seq?

STATEMENT OF THE CASE

Plaintiff, an architect, was employed as such by defendant with the title of Development Administrator in January, 1968. In November, 1970 plaintiff was advised that her employment would be discontinued for budgeting reasons. Plaintiff believed that she was being selected for termination out of seniority because of her sex and filed a complaint with the New York Division of Human Rights.

The State Division of Human Rights found probable cause that plaintiff had been discharged because of her sex since she had more seniority than at least four other architects, all male, who were not laid off. Despite this finding, the complaint was later dismissed on the ground of administrative convenience.

Thereafter, plaintiff filed a similar complaint with the Equal Employment Opportunity Commission. The Commission found defendant was an employer within the meaning of Title VII and also found reasonable cause to believe that defendant discriminated against plaintiff by laying her off instead of males having less seniority. The Commission invited defendant to resolve the matter but

was refused.

Thereafter, on September 25, 1975, plaintiff brought an action against defendant alleging employment discrimination because of sex under Title VII of the Civil Rights Act of 1964.

Defendant took the position that since plaintiff's complaint was based on acts of discrimination taking place no later than January 15, 1971, defendant was exempt from the provision of Title VII of the Civil Rights Act as a "political subdivision" which was not brought under coverage of Title VII until March, 1972. Defendant moved to dismiss on these grounds.

Plaintiff respectfully submits that defendant is not a political subdivision for the purposes of a Title VII exemption and that the court below erred in dismissing plaintiff's complaint on the ground that it did not state a cause of action.

ARGUMENT

SUMMARY

Title VII of the Civil Rights Act of 1964 does not preempt the field but provides that state law shall apply unless such law would permit an act which would be

an unlawful employment practice under Title VII. Under state law and by its own definition, defendant is not a political subdivision and was thus not exempt from the sanctions imposed by Title VII at the time the discriminatory acts complained of took place.

POINT I

DEFENDANT WAS CREATED AS AND IS A
PUBLIC BENEFIT CORPORATION AND NOT
A POLITICAL SUBDIVISION

Defendant was created by the Health and Mental Hygiene Facilities Improvement Act. Laws 1968, Chapter 359; CLS Unconsol. Laws, Chap. 214. Section 4(1) of that Act specifically defines defendant as a "corporate governmental agency constituting a public benefit corporation. It shall have the powers and privileges of a corporation ..." (emphasis supplied). The enabling statute does not provide that defendant has the "powers and privileges" of a political subdivision.

That political subdivisions are separate and distinct from public benefit corporations is uncontravertible after examining pertinent state statutes. The Court's attention is respectfully directed to Laws 1969, Chapter 1016 which created the New York City Health and Hospitals

Corporation. . CLS Unconsol. Laws, Chap. 214-A. That corporation was also created as a "public benefit corporation." §4(1). However in 1970 Section 4 of the enabling act was amended with the addition of Section 4-a which provided:

For the purposes of Section One Hundred Seventy-Five (a) and One Hundred Seventy-Five (b) of the State Finance Law, the corporation shall be deemed to be a political subdivision.

Thus the legislative intent was made crystal clear. The entity created by Chap. 214-A was and is a public benefit corporation. However, for a specific purpose it was, by amendment, designated a political subdivision, clearly establishing the distinction between the two. Defendant's enabling statute was not amended. Thus defendant remained a public benefit corporation for all purposes. Clearly if "public benefit corporation" and "political subdivision" were meant to be synonymous, the 1970 Amendment to Chapter 214-A was meaningless.

It should also be noted that Sections 175(a) and (b) of the State Finance Law discuss transactions with a "political subdivision or a public benefit corporation", again clearly indicating a distinction. (emphasis supplied)

If a public benefit corporation were synonymous with a political subdivision, these sections, too, would be meaningless.

Furthermore, under the Public Contract section of the General Municipal Law, the term "political subdivision" is defined as "a municipal corporation, school district, district corporation and board of cooperative educational services." CLS Gen. Mun. L. §100.

Under Chap. 823, Laws 1939, entitled Payment For Political Subdivisions In Lieu of Taxes By The United' States, the term "political subdivision" is defined as "any agency or unit of this state which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied." CLS Unconsol. Laws, Chap. 284 §1(2). Defendant's enumerated powers give it no such authorization.

It is clear that defendant was created by the legislature as a public benefit corporation with the powers and privileges of such a corporation. Had the legislature intended defendant to be a political subdivision even for the limited purposes of a Title VII exemption, "it could easily have so provided in the special act ..." N.Y. Post Corporation v. Moses 10 NY 2d 199, 205, 219 N.Y.S. 2d 7, 11 (1961). It did not so provide and thus defendant, specifically created as a public

benefit corporation, cannot call itself a political subdivision for the sole purpose of avoiding liability under Title VII.

POINT II

TITLE VII EXEMPTION APPLIES ONLY TO
POLITICAL SUBDIVISIONS, NOT TO
ALL STATE AGENCIES

Contrary to defendant's position, not all State employees were exempt prior to March 24, 1972. The exemption extended onto "a State or political subdivision thereof ..." (emphasis supplied) 42 U.S.C. §2000(e)(b)

As is clear from the statutes, the New York legislature did not intend the terms "political subdivision", "public benefit corporation" or "governmental agency" to be synonymous. Thus, Section 175(a) of the New York State Finance Law regulates certain sales "to the State or any governmental agency or political subdivision or public benefit corporation thereof ..." As stated above, defendant was specifically created as a public benefit corporation. CLS Unconsol. Laws, Chap. 214 § 4(1). If Congress had intended the exemption to apply to public benefit corporations or to all State employees it could easily have so provided. However, it did not so provide.

The court below sets forth defendant's powers as a corporation and then finds that it is a political sub--

division. If its ruling is correct, there would be no distinction between governmental agencies, political subdivisions and public benefit corporations and the exemption under Title VII would apply to all State employees. This would be directly contrary to the clear intent of Congress and New York legislature.

POINT III

TITLE VII PROVIDES THAT STATE LAW APPLIES

Defendant has consistently and erroneously taken the position that under the NLRB test, it is a political subdivision. However, to apply the NLRB test would be directly contrary to the clear provision of Title VII.

While federal law preempts the field in labor relations law¹, there is no such preemption in the area of civil rights. Indeed, 42 U.S.C. §2000(e)-7 provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter. Pub. L. 88-352, Title VII § 708, July 2, 1964, 78 Stat. 262.

¹ San Diego Building Trades Council, etc. v. Garmon
359 U.S. 236, 79 S. Ct. 773 (1959)

In enacting Section 2000(e)-7, Congress dis-claimed any general preemptive interest. Hays v. Potlatch Forests, Inc., 465 F. 2d 1081 (8th Cir. - 1972) The purpose of this section was to void only those state laws which would permit an unlawful employment practice and to save those laws which would prevent such a practice. Le Blanc v. Southern Bell Tel. & Tel. Co. 333 F. Supp. 602 aff'd. 460 F. 2d 1228 cert. den. 409 U.S. 990, 93 S. Ct. 320.

Under the clear language of Section 2000(e)-7 and the cases interpreting it, the state law creating defendant as a public benefit corporation rather than a political subdivision must apply. State law would only be superceded if it would allow behavior prohibited by Title VII. In the instant case, if state law were not applied, the reverse would be true.

CONCLUSION

It is respectfully submitted as follows:

1. The Title VII exemption sought by defendant extends only to political subdivisions.
2. State law must determine whether or not defendant is a political subdivision.

3. Defendant was specifically created by New York law as a public benefit corporation.

4. Legislative intent clearly establishes that the terms political subdivision and public benefit corporation are not synonymous.

5. Defendant was and is a public benefit corporation and not a political subdivision for the purpose of the Title VII exemption.

It is further respectfully submitted that the decision of the court below dismissing plaintiff's complaint on the grounds that defendant was a political subdivision and thus not covered by the provisions of Title VII be reversed with costs in favor of plaintiff.

Respectfully submitted,

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OF COUNSEL

FLOYD S. WEIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THEODORE RICHMAN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1361 E 88 St
Brooklyn N.Y.

That on the 18 day of JUNE, 1976,
deponent personally served the within BRIEF FOR
PLAINTIFF-APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

HON. LOUIS J. LEFKOWITZ
ATTORNEY GENERAL - STATE OF NEW YORK
ATTORNEY FOR DEFENDANT-APPELLEE
2 WORLD TRADE CENTER
NEW YORK, N.Y. 10047

Sworn to before me this

18 day of June, 1976

Theodore Richman

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977